

Alphabet Soup

Legal Impacts of Proposed Water Quality Standards and Possible Litigation Scenarios

Douglas Steding

Graham & Dunn

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Fish Consumption: How Is It Used?

Fish Consumption Rate (FCR) is one of the variables used to assess risks posed by toxics to humans:

■ **Used in sediment cleanups**

- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- Model Toxics Control Act (MTCA)
- Sediment Management Standards (SMS)

■ **Used in setting water quality standards (WQS”) for toxics**

- Federal Water Pollution Control Act (CWA)

Assessing Risk for Sediment Cleanups

Assess current risk:

Risk of cancer (“excess risk”) =

chemical specific chronic daily intake

multipl

Fish consumption here

route and chemical-specific carcinogenic slope factor

Fish Consumption Translated to Risk

Table B.5-3. Excess cancer risk estimates for the child tribal RME seafood consumption scenario based on Tulalip data

Scenario timeframe: Current/future				
Medium: Sediment				
Exposure medium: Fish and shellfish tissue				
Receptor population: Tribal fish and shellfish consumers				
Receptor age: Child				
CHEMICAL	EPC (mg/kg ww) ^a	CANCER CDI (mg/kg-day)	CANCER SLOPE FACTOR (kg/mg-day) ⁻¹	EXCESS CANCER RISK
Arsenic ^{b, c}	Table B.3-34	1.8×10^{-4}	1.5	3×10^{-4}
Bis(2-ethylhexyl) phthalate	Table B.3-36	8.3×10^{-5}	0.014	1×10^{-6}
cPAHs ^{b, d, e}	Table B.3-36	1.8×10^{-6}	7.3	7×10^{-5}
Dioxin/furan TEQ ^f	na	na	na	na
PCB TEQ ^b	Table B.3-35	1.5×10^{-9}	150,000	2×10^{-4}
Total PCBs	Table B.3-35	1.5×10^{-4}	2	3×10^{-4}
Pentachlorophenol ^f	Table B.3-36	1.3×10^{-4}	0.12	2×10^{-5}
Subtotal excluding PCB TEQ				7×10^{-4}
Subtotal excluding total PCBs				6×10^{-4}

Setting Cleanup Standards

- **Choose an acceptable risk level**
- **Back-calculate cleanup standards based on chosen exposure parameters:**
 - Body weight
 - Exposure duration
 - Fish consumption

Connecting Sediment to Fish

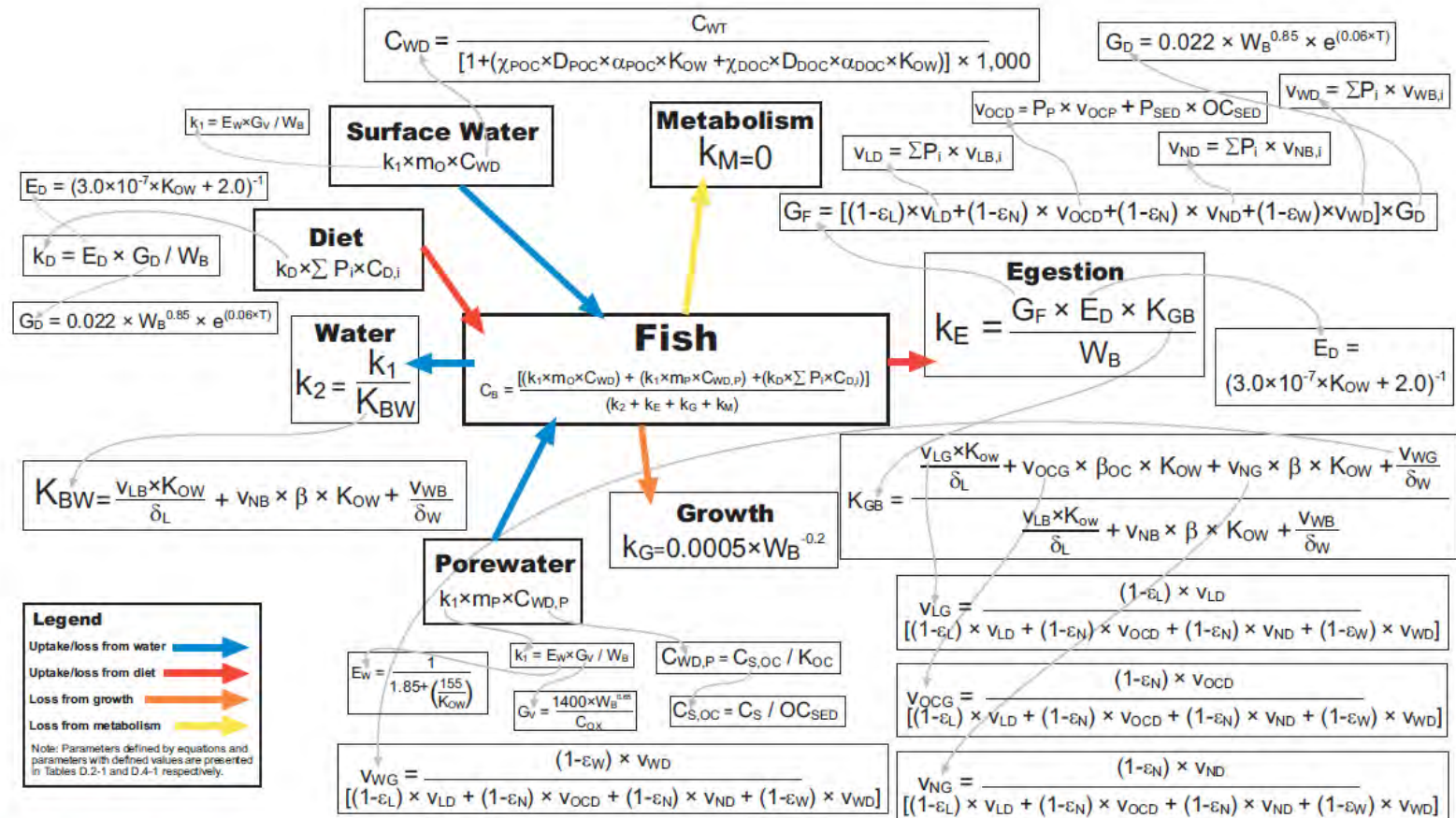


Figure D.2-1. Equations and parameters used to estimate total PCB concentrations for fish in the Amot and Gobas model

Fish Consumption and Water Quality Standards

- **Clean Water Act (CWA) requires states to implement Water Quality Standards (WQS) for toxics**
- **Human Health Criteria (HHC) are those criteria adopted to be protective of human health (cancer and non-cancer risk)**

Washington's Current WQS for Toxics

- **Washington currently applies the “National Toxics Rule”:**
 - Ninety-one (91) toxics
 - One in a million excess cancer risk level
 - Fish consumption rate of 6.5 grams per day (one meal a month)

Washington's Proposed WQS for Toxics

- **FCR of 175 grams per day**
- **Excess cancer risk of 10 - 5**
- **Implementation tools**
 - Compliance schedules
 - Variances
 - Intake credits

Timeline

- **Draft proposed rule - September 2014**
- **Rule out for public comment - 2015**
- **Submittal to EPA - 2015**

Litigation Scenarios

■ APA challenges

- *Puget Soundkeeper et. al. v. McCarthy*, Case No. C13-1839-JCC (W.D. Wash. 2014)
- Post-rulemaking challenges

■ Treaty-based lawsuits

Puget Soundkeeper et. al. v. McCarthy

■ **Filed October 2013**

- Under the CWA, EPA must promulgate new standards for a state within 90 days of making a determination that (a) new or revised standards promulgated by a state are not consistent with the requirements of the CWA; or (b) where EPA determines that a revised or new standard is “necessary to carry out the requirements” of the CWA.
- EPA has been emailing and corresponding with Ecology since 2010 on fish consumption issue.
- Plaintiffs argued that the emails and correspondence amounted to a determination that “a revised or new standard” was necessary.

Judge Coughenour's Decision

- **Correspondence between EPA and Ecology were not determinations under CWA Section 303(b)(4)(B)**
- **Court lacked jurisdiction under the APA because there was no failure by EPA to perform a non-discretionary duty (i.e., promulgate new standards for Washington)**

Post-Rulemaking Challenges

- **State Administrative Procedure Act challenge**
 - Regulated community
 - Environmental advocates
 - Tribes
- **Challenge of EPA's approval of new WQS**
- **Treaty-based litigation**

Tribal Challenge

“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.”

– Treaty of Point Elliott, 1855

U.S. v. Washington (“Boldt” Decision)

■ Phase I

- “In common” means a right to take half of harvestable salmon at usual and accustomed fishing places
- Established tribes as co-managers of salmon resources, and confirmed ability of tribes to regulate themselves
- Future determinations (e.g. Culvert decision)

■ Phase II

- Right to hatchery fish?
- Right to declaratory judgment that regulatory practices cannot impair treaty rights?

Boldt Phase II Revival?

- Tribes have a right to hatchery fish
- No right to declaratory judgment on regulatory issues such as logging because:
 - “The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.”

- United States v. State of Wash.,
759 F.2d 1353, 1357 (9th Cir. 1985)

Are the New WQS the “Particular Case”?

- **Tribal reaction to proposed rule was not positive:**

“This rule should already be in place,” said Jim Peters, a member of the Squaxin Island Tribal Council. “We’ve had three different times where we had dates set for them to start promulgating their rules. And every time they haven’t been able to meet them.”

The Northwest Indian Fisheries Commission, which represents 20 western Washington tribes, has criticized the draft rule and has asked the U.S. Environmental Protection Agency to intervene.

“That’s just not acceptable for our tribe, for any tribe in the state or anybody who eats a lot of salmon,” Peters said, noting that **the plan would increase the cancer-risk level for some chemicals**. “They really don’t understand that impact to our people.”



NW Indian Fisheries @nwifc · Jul 9

Russ Hepfer, Lower Elwha: It's not what we wanted. It's unacceptable to me, It's good on one side, and it takes it away on the other end.



- **Dennis McLerran letter to Senator Ericksen July 1, 2014**

I firmly believe that there is a way for Ecology to adopt a water quality standards package that retains the State’s current 10^{-6} level of protection from cancer-causing pollutants while giving industry time to comply with more stringent water quality criteria through implementation tools, such as compliance schedules and variances. I think this approach could support a thriving economy while protecting higher fish consuming populations.

Thank You

Douglas Steding

dsteding@grahamdunn.com

206.340.9650

www.grahamdunn.com

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